STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT
Location: Portland
DOCKET NO. BCD-AP-18-02

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| MAINE EQUAL JUSTICE PARTNERS, CONSUMERS FOR AFFORDABLE HEALTH CARE, et al., | ) | |
| Petitioners, | ) | **RESPONDENT'S BRIEF IN OPPOSITION TO RULE 80C PETITION** |
| v. | ) | |
| RICKER HAMILTON, Commissioner, Maine Department of Health & Human Services | ) | |
| Respondent | ) | |

The Respondent, Ricker Hamilton, in his official capacity as Commissioner of the Maine Department of Health & Human Services ("DHHS"), submits this brief in opposition to the Rule 80C petition filed by Petitioners.

## INTRODUCTION

Petitioners seek an order from this Court compelling the Commissioner to take actions that would commit the State to the expenditure of *tens of millions* of dollars in unappropriated money in the next fiscal year alone—and *hundreds of millions* of dollars over the course of the next two biennial budget periods. The courts in this State reject attempts to force the expenditure of funds for a simple but fundamental reason: in our tripartite scheme of government, the Legislature (and only the Legislature) has the power to appropriate funds. In this case, the Legislature has not appropriated funds that all sides agree are required in order to implement Medicaid expansion. And the referendum language now codified at 22 M.R.S.A. § 3174-G(1)(H) itself provided no appropriation or other source of funding, instead leaving that essential task subject to the ordinary legislative process. That should be the end of this case.

Petitioners misleadingly claim that "the Court's task is limited" and that § 3174-G(1)(H) imposes a "simple" mandate, Petitioners' Memo. at 1. The reality is far more stark. Submitting a Medicaid State Plan Amendment ("SPA") constitutes a commitment by the State to enter into a new contract with the federal government. This contract would include an obligation to pay an increasing share of the costs of expanded Medicaid coverage. This is estimated to cost the State *more than $50 million in Fiscal Year 2019 alone*. It also would require a massive change to the staffing at DHHS, including the hiring of more than 100 new employees to assist with enrollment and claims processing, at an additional cost of more than $2 million per year.

The Legislature has not appropriated *any* of the money necessary to fund these significant obligations. Because "[a]ppropriation and budgeting are powers given exclusively to the legislative branch by the Maine Constitution," *LePage v. Mills*, No. CV-17-95, 2017 WL 6513582, *6 (Me. Super. Oct.16, 2017) (Murphy, J.) the Commissioner plainly lacks legal authority to enter into that contract or approve those expenditures. Indeed, to do so would violate a number of other statutes that prohibit officials from incurring an obligation on behalf of the State for which no appropriation has been made, some of which include *criminal* penalties. Nor can this Court enter an order requiring the Commissioner to take acts that would amount to an appropriation of funds. *See, e.g.*, *Weston v. Dane*, 53 Me. 372, 372 (1865); *Mills*, 2017 WL 6513582, *5-*6 (noting that "[t]he Court does not have jurisdiction to issue such an order" that "would essentially be appropriating funds [and] . . . redistributing them to the Executive Branch").

For all these reasons, any provision of § 3174-G(1)(H) that required state officials to enter into a binding commitment for the expenditure of funds that had not been appropriated by the

Legislature would be unconstitutional. But the Court need not decide that weighty question. The statutory deadline upon which Petitioners rely is better interpreted as not requiring action by the Commissioner *until the necessary appropriations are in place*. To begin, the text imposes no consequences for missing the 90-day deadline, and it is obvious that factors beyond the Commissioner's control could delay the timetable for obtaining approval of a SPA. This indicates that the time limit is directory, not mandatory. *Guarantee Tr. Life Ins. Co. v. Superintendent of Ins.*, 2013 ME 102, ¶ 39, 82 A.3d 121, 132 (2013). Nor is there any question that those who drafted the measure and approved it were aware that further appropriations through the ordinary legislative process would be required before the Commissioner could implement Medicaid expansion. Indeed, voters were explicitly advised in a Fiscal Impact Statement accompanying the referendum that, "[i]f approved by the voters, *additional implementing legislation will be required* to provide the additional appropriations and allocations." Rule 80C Record ("Record") at 8 (emphasis added).[1] And in any event, the Legislature's failure to appropriate the necessary funding is an act itself that effectively amends any obligation the Commissioner has under § 3174-G(1)(H). *See* Atty. Gen. Op. 05-4, 2005 WL 4542877, at *4 (noting that the Legislature's decision "not to provide the additional appropriations required to fund" an initiative passed by referendum "falls within the Legislature's power").

[1] Contemporaneous press coverage likewise noted the necessity of an appropriation to implement the initiative. *See, e.g.*, Amber Phillips, *The Fix*, Wash. Post (Nov. 8, 2017), *available at* https://www.washingtonpost.com/news/the-fix/wp/2017/11/07/maine-could-become-the-first-state-to-expand-medicaid-by-ballot-initiative/?noredirect=on&utm_term=.3c29c9a27dff ("[T]op officials in the state legislature say they're willing to figure out a way to fund it."); Sarah Jones, *Inside Maine's Fight to Expand Medicaid*, The New Republic (Nov. 13, 2017), *available at* https://newrepublic.com/article/145804/inside-maines-fight-expand-medicaid (noting that "[a]s long as the state legislature finds a way to fund it, LePage must implement the policy").

Finally, the Petition's cryptic request for an order requiring the Commissioner to engage in rulemaking by July 2, 2018—argued only in a footnote, *see* Petitioners' Memo. at 10 n.2—may alternatively be dismissed on justiciability grounds. The Petitioners have miscalculated the effective date of the Act and, as a consequence, incorrectly state the deadlines set forth in § 3174-G(1)(H). Even if the requirements of that paragraph could be enforced against the Commissioner without the necessary appropriation, the failure of Petitioners to exhaust those remedies with the agency and the amount of time remaining for them to do so provides an alternative basis to dismiss that aspect of the Petition.

## BACKGROUND

### A. The Federal Government's Offer to States to Incentivize Medicaid Expansion

Enacted in 1965, Medicaid offers federal funding to States to assist low-income individuals and families in obtaining medical care. *See* 42 U.S.C. § 1396a(a)(10); *Nat. Fed. of Indep. Businesses v. Sebelius*, 567 U.S. 519, 541-42 (2012). To receive that federal funding, States must comply with federal criteria governing matters such as who receives care and what services are provided at what cost. *Id.* Since 1982, every State has participated in Medicaid, and federal Medicaid funding now comprises a substantial portion of state budgets (often more than 10%). *Id.*

The Patient Protection and Affordable Care Act of 2010 ("ACA") expanded the scope of the Medicaid program and dramatically increased the number of individuals the States must cover. For example, the ACA required state programs to provide Medicaid coverage to adults with incomes up to 133% of the federal poverty level, even though at the time the statute was enacted many States covered adults with children only at lower income levels and did not cover childless adults at all. *See* § 1396a(a)(10)(A)(i)(VIII). The ACA increased federal funding to cover the States' costs in expanding Medicaid coverage, although States would also bear a portion of the expansion costs. § 1396d(y)(1). If a State did not comply with the new coverage requirements, it would lose not only the federal funding for the expansion, but *all* of its Medicaid funds. § 1396c.

In *NFIB v. Sebelius*, a 7-2 majority of the Supreme Court declared the ACA's mandatory Medicaid expansion provisions to be unconstitutional. The Court found the ACA's threat of a State losing all of its preexisting Medicaid funding if it did not expand the program to be "a gun to the head" that "leaves the States with no real option but to acquiesce in the Medicaid expansion." 567 U.S. at 581-82. The Court concluded that the expanded coverage mandated by the ACA was an entirely "new health care program" that involved not just "car[ing] for the neediest among us," but rather "an element of a comprehensive national plan to provide universal health insurance coverage." *Id.* at 583. To remedy the ACA's unconstitutional coercion of States, the Court held that "the Secretary cannot apply [the ACA] to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion." *Id.* at 585.

The core holding of *NFIB* was to make the Medicaid expansion under the ACA truly optional. States that chose to expand would receive additional federal funding as set forth in the ACA, but those that chose not to expand would not risk the loss of existing funding. The ACA encouraged States to expand Medicaid by offering 100% federal funding of the expansion between 2014 and 2016. *See* § 1396d(y)(1). The federal share of funding for the expansion would then decrease to 95% in 2017, 94% in 2018, 93% in 2019, and 90% in 2020 and thereafter. *Id*

### B. Failed Legislative Attempts to Expand Medicaid in Maine

Following the decision in *NFIB*, the Legislature considered numerous attempts to expand Medicaid in Maine. Each attempt failed. This process was contentious, largely because of the massive costs the State would incur as the federal government's subsidies declined over time. The initial attempt, in 2013, included a fiscal note that projected the overall costs to the State of expanding coverage to be nearly $9 million over four years (in addition to the $2 million per year needed for increased DHHS staffing). *See* L.D. 1546 (126th Legislature) Fiscal Note. Naturally, those costs increased rapidly with each successive proposed bill. The Legislature's fifth (and most recent) attempt, in 2016, saw the corresponding four-year projection grow to $93 million, as Maine's Office of Fiscal and Program Review ("OFPR") accounted for the diminishing subsidies to be received from the federal government. *See* L.D. 633 (127th Legislature) Fiscal Note.

Given the substantial cost of Medicaid expansion to the State, every legislative proposal for expansion included with it a corresponding appropriation from the General Fund for the remainder of the applicable biennial budget period, as set forth below.

| **Legislative Document** | **General Fund Appropriation** | **Source** |
|---|---|---|
| L.D. 1546 | $4,074,584 | L.D. 1546 (126th Legislature) § F-1 |
| L.D. 1066 | $4,074,584 | L.D. 1066 (126th Legislature) § D-1 |
| L.D. 1640 | $2,115,201 | L.D.1640 (126th Legislature) § C-1 |
| L.D. 1578 | $2,064,435 | L.D. 1578 (126th Legislature) § D-1 |
| L.D. 633 | $25,549,248 | L.D. 633 (127th Legislature) § A-8 |

The size of the required appropriation—and the projected need for hundreds of millions of dollars in future appropriations going forward—was the focus of those who opposed the measure, including the Governor. *See* Record at 15-17. The Governor exercised his constitutionally vested veto power over the first four proposed expansion bills, and the Legislature failed to override each veto. *See* Petition ¶¶ 33-36. The fifth proposal (L.D. 633) died on the floor of the Senate upon adjournment of the 127th Legislature. *Id.* ¶ 37.

### C. The Referendum on Medicaid Expansion

In 2017, supporters of Medicaid expansion gathered the requisite signatures to place a referendum supporting Medicaid expansion on the ballot. Question 2 asked Maine's voters: "Do you want Maine to expand Medicaid to provide healthcare coverage for qualified adults under age 65 with incomes at or below 138% of the federal poverty level, which in 2017 means $16,643 for a single person and $22,412 for a family of two?" *See* Record at 3.

The statutory text of the referendum included three sets of instructions to DHHS. First, within 90 days of the statute's effective date, "the department shall submit a state plan amendment to the United States Department of Health and Human Services" ensuring Medicaid coverage for the expanded populations. 22 M.R.S.A. § 3174-G(1)(H). Second, "[t]he department shall adopt rules . . . to implement this paragraph in a timely manner to ensure that the persons described in this paragraph are enrolled for and eligible to receive services no later than 180 days after the effective date of this paragraph." *Id.* Finally, "[n]o later than 180 days after the effective date of this paragraph . . . the department shall provide" medical assistance to a person who falls within the expanded population. *Id.*; *see also* Record at 4-5.

Like the unsuccessful legislation that came before it, the expanded coverage provided for in Question 2 carried with it substantial costs for the State. OFPR noted as much in the Fiscal Impact Statement it prepared for Question 2, which was included in the Citizen's Guide distributed to voters. Record at 8. OFPR estimated that "when fully implemented, this initiative is anticipated to require net annual appropriations from the General Fund of $54,495,000." *Id.* This included:

- "annual General Fund appropriations of $2,578,609 . . . for the state share of the costs of 103 new positions to administer the MaineCare eligibility expansion." *Id.*

- "annual General Fund appropriations of $50,366,696 to the DHHS for medical costs for the newly eligible childless adult population." *Id.*
- "annual General Fund appropriations of $28,139,957 to the DHHS for medical costs for the parent's population between 101% to 138% of the federal poverty level." *Id.*
- "annual General Fund appropriations of $409,745 to the DHHS for medical costs for the children who have not had MaineCare in the past, but whose family will opt for MaineCare coverage after expansion." *Id.*[2]

Unlike the earlier legislation, the referendum did not include *any* funding mechanism. It certainly could have done so; prior referenda have included taxes or other provisions sufficient to provide the revenue necessary to support the costs of the proposed law. *See, e.g.*, 36 M.R.S.A. § 5111 (imposing a 3% income tax surcharge to pay for education funding approved by popular referendum), *repealed* PL 2017, c. 284, Pt. D, §§ 2-3. But the proponents of Question 2 (which included some of the Petitioners here) elected not to include a funding mechanism, perhaps out of concern that it would have inhibited passage of the referendum. But it was clear that implementation of Question 2 would require an appropriation through the ordinary legislative process. Indeed, OFPR made this point explicit in the Secretary of State's Citizen's Guide: "*If approved by the voters, additional implementing legislation will be required to provide the additional appropriations and allocations*." Record at 8. (emphasis added). As noted above, contemporaneous press coverage also highlighted the need for an appropriation to implement the initiative. *See supra*, note 1.

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[2] These numbers were offset in OFPR's estimate because, in its view, "[a]lthough overall costs will increase under this initiative, some programs will achieve savings that will mitigate the additional expenditures." Record at 8.

Slightly less than 60% of voters approved the measure on November 7, 2017. The Secretary of State issued a proclamation regarding the results of the election on December 6, 2018.

**D. The Legislature's Failure to Provide Funding to Implement Question 2**

Following the 2017 election, the 128th Legislature reconvened on January 3, 2018. On that same day, the Commissioner submitted a memo to the Joint Standing Committee on Appropriations, setting forth its own higher estimate of the total cost of Medicaid expansion. DHHS estimated that implementation would cost the State more than $58 million in FY 2019, $82 million in FY 2020, $97 million in FY 2021, and $103 million in FY 2022. Record at 22. The Commissioner's memo also explained differences in assumptions that resulted in a higher estimate of costs than OFPR, and addressed "practical considerations" affecting the implementation schedule. Record at 20. "The reality is that in order to buy health care for more than 80,000 people, the State needs the money to pay for it." *Id*. For example, the Commissioner noted, "the Department cannot begin basic hiring activities until the Legislature authorizes and appropriates for the 103 new necessary positions. Without the positions and an adequate operational structure in place, the massive workload of implementing expansion to 80,000 people will have a detrimental impact on program Department-wide." *Id.* at 21.[3]

The Commissioner also noted that the implementation timeline set forth in Question 2 failed to account for the possibility that the required amendment to the state Medicaid plan may

[3] DHHS estimates that the number of enrolled members will be larger than proponents estimate, based in part on the experience of other States. For example, one report from Montana found that four of five States that expanded Medicaid in January 2014 saw increases over their projected enrollment by FY 2016—some of them by more than 100,000 new clients. *See* http://leg.mt.gov/content/Publications/fiscal/interim/March-2018/State-Medicaid-Expansion-Experiences.pdf. And when Montana expanded Medicaid in 2015, this pattern held: The State initially estimated that up to 70,000 people would enroll in the expanded program. By January of this year, enrollment already had soared to 91,000. *See https://www.greatfallstribune.com/story/news/2018/01/18/91-k-enrolled-montana-medicaid-expansion-panel-told/1045251001/*

not be approved or denied by CMS within 90 days. Nor did it provide for a contingency in the event that it was, in fact, denied. In conclusion, the Commissioner reiterated that "[i]t is vital that the citizen initiative be implemented in a manner that furthers that mission, and avoids harm to Mainers in need of assistance." *Id.* at 21.

Consistent with the terms of Question 2, the Commissioner submitted two additional reports to the Joint Standing Committee in February and March 2018. *See* Record at 14, 27. These reports each included a copy of an earlier letter to legislators from the Governor, in which he raised concerns about the cost of Medicaid expansion and identified funding approaches that he would reject due to their negative consequences on existing programs or the state's fiscal health. *Id.* at 15-17; 28-30. And the Commissioner's reports reiterated that "the Department of Health and Human Services will not be taking any action to implement Medicaid expansion until it is appropriately funded." *Id.* at 14, 27.[4]

Notwithstanding the clear need for implementing appropriations, no bill to fund any part of Question 2's implementation was introduced in the Legislature until April 9, 2018. On that day, L.D. 837 was amended to provide an appropriation in the coming fiscal year of $3.8 million, to pay only for the hiring of new staff and other logistical matters associated with the enrollment and administration of the expanded population. L.D. 837 did not appropriate any money to cover the State's anticipated share of medical costs. At the hearing, several proponents—including the Petitioners here—noted the need for the Legislature to provide funding before Question 2 could be implemented. Rep. Erik Jorgensen, the bill's sponsor, noted that "[t]he purpose of this bill . . . is simply to provide funding for the technology upgrades and 103 staff and that DHHS needs to begin taking applications on July 2, 2018 . . . DHHS needs the resources to do its work." Robyn

[4] A similar report was submitted on May 10, 2018, after this lawsuit was filed.

Merrill, speaking on behalf of Petitioner Maine Equal Justice Partners, recognized that "[a]ppropriating funding for the administrative costs of implementing Medicaid expansion is an important step in this process." And Kate Ende, of Consumers for Affordable Health Care, testified, "in support of L.D. 837 . . . that would provide funding for administrative costs necessary to implement Medicaid expansion."[5]

But even this partial measure—which funded only a fraction of the tens of millions of dollars needed to pay for Medicaid expansion in this biennium alone—went nowhere. L.D. 837 was brought before the House on April 13, but was immediately tabled and there was no floor discussion of the bill, or any roll call vote. The Legislature adjourned *sine die* on May 2, 2018, without appropriating one dollar toward the costs of Medicaid expansion.

### E. The Mechanics of Medicaid Expansion by State Plan Amendment

To qualify for federal assistance under the Medicaid program, a State must submit to the federal government a "state plan" for "medical assistance," 42 U.S.C. § 1396a(a), that contains a comprehensive statement describing the nature and scope of the State's Medicaid program. 42 C.F.R. § 430.10. The State Plan must be approved by the federal Centers for Medicare and Medicaid Services (CMS) before taking effect. 42 U.S.C. § 1396a; 42 C.F.R. § 430.10. Similarly, to make a change to its existing Medicaid program, a State must prepare a State Plan Amendment (SPA) and obtain CMS approval. 42 C.F.R. § 430.12. States that include Indian Health Programs (such as Maine) must also provide 30 days' advance public notice of proposed changes to Indian tribes before submitting them to CMS. *See* 42 U.S.C. § 1396a(a)(73)(A); Record at 27.

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[5] Testimony from the public hearing is available at http://www.mainelegislature.org/legis/bills/display_ps.asp?ld=837&PID=1456&snum=128&sec3.

A formal SPA submission is comprised of a cover letter; a CMS 179 form, which includes a discussion of the budget impact and regulatory references; the state plan pages impacted by the amendment (in both clean and tracked change versions);[6] answers to questions about funding; and proof of tribal notice.

Following a formal submission by the State, CMS has 90 days to respond to the proposed SPA. *See* 42 C.F.R. § 430.16. It may approve, disapprove, or issue a Request for Additional Information (RAI); failure to respond within the timeframe results in the SPA being automatically approved. *Id.* CMS typically issues RAIs on an informal basis, working with the State to resolve outstanding questions within the initial 90-day window. If there are questions that cannot be resolved within that timeframe, CMS may issue a Formal RAI. A State has 90 days to respond to a formal RAI, and it may withdraw the SPA to toll that period while working with CMS to resolve outstanding questions. Once a SPA is approved, a State may not alter or withdraw its terms except by submission of new SPA, which is subject to the same approval process.

SPAs are often approved very quickly, sometimes in a matter of days or weeks. *See, e.g.*, Maine SPA 18-004 (submitted 1/26/18, approved 2/16/18); Maine SPA 17-003 (submitted 12/5/2017; approved 1/25/2018). Indeed, other States that have submitted SPAs to expand their Medicaid programs under the ACA have experienced little to no delay in receiving CMS approval. For example, Rhode Island and Washington received CMS approval of their expansion SPAs on the same day they submitted their SPAs. *See* Rhode Island SPA 13-0030-MM1 (submitted 12/13/2013, approved 12/13/2013); Washington SPA 13-0030 (submitted 12/19/2013, approved 12/19/2013). Maryland, New York, and Nevada each received CMS approval two days after

[6] The form can be viewed at https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/Downloads/CMS179.pdf

submitting SPAs. *See* Maryland SPA 13-0020-MM1 (submitted 12/11/13, approved 12/13/13); New York SPA13-0040-MM1 (submitted 12/11/13, approved 12/13/13); Nevada SPA13-0035-MM (submitted 12/17/13, approved 12/19/13). Minnesota's SPA was approved by CMS in seven days, *see* Minnesota SPA 13-0027-MM1A (submitted 12/6/13, approved 12/13/13). Connecticut's was approved in nine. *See* Connecticut SPA 14-015-MM1 (submitted 1/22/14, approved 1/31/14).[7]

### F. Petitioners' Appeal

Petitioners are various non-profit advocacy organizations and individuals who allege they would be covered by Medicaid expansion if Question 2 were implemented in full. Petition ¶¶ 7-25. In the petition, they contend that DHHS has failed to take required agency action to implement Question 2. Specifically, they contend that "[t]he Commissioner has failed or refused to submit the state plan amendment to CMS by April 3, 2018, as required by the Act." *Id.* ¶ 6. They seek an order requiring, among other things, that DHHS, within 3 days, submit the required SPA to CMS" and that it "adopt the required rules in a timely manner to ensure that eligible individuals are enrolled for and eligible to receive services no later than July 2, 2018[.]" *Id.* at 13-14. In other words, Petitioners seek to require DHHS to take all the steps necessary to expand Medicaid—and commit the State to the expenditure of at least $52 million per year going forward—notwithstanding the Legislature's failure to appropriate funds necessary for that task.

## ARGUMENT

### I. Absent An Appropriation, The Commissioner Cannot Submit A SPA, And The Court Cannot Compel Him to Do So.

The primary relief sought by Petitioners is an order from this Court requiring that "DHHS, within 3 days, submit the required state plan amendment to CMS." Petition at 13; Petitioners'

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7 These plan amendments can be viewed at https://www.medicaid.gov/state-resource-center/medicaid-state-plan-amendments/index.html

Memo at 10. This request should be denied. Filing a SPA with the federal government is the key step that would obligate the State to incur tens of millions of dollars in costs in the current biennium alone. No appropriation has been made to fund those enormous State expenditures. Without an appropriation, the requested order would violate the Maine Constitution, conflict with numerous statutes, and ignore both the legal effect of Question Two's failure to provide a funding mechanism and the Legislature's decision not to appropriate the funds necessary to its implementation.

### A. Submission of a SPA is a commitment by the State to enter into a contractual obligation with the federal government and requires the expenditure of tens of millions of dollars this biennium.

"Spending Clause legislation like Medicaid is 'much in the nature of a contract.'" *Armstrong v. Exceptional Child Center*, 135 S. Ct. 1378, 1387 (2015) (quoting *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)); *see also id.* (Medicaid agreements are akin to "contracts between two governments"). That is, "in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst*, 451 U.S. at 17. As long as the State has "exercise[d] [its] choice knowingly, cognizant of the consequences of [its] participation," *id.*, then it is bound by federal law to meet its obligations under Spending Clause programs it has elected to join. In short, in a "federal-state funding and spending agreement" such as Medicaid, "[t]he State *promises* to provide certain services to private individuals, in exchange for which the Federal Government *promises* to give the State funds." *Blessing v. Freestone*, 520 U.S. 329, 349 (1997) (Scalia, J., concurring) (emphases added).

Indeed, the obligations a State assumes when it opts into the Medicaid program are even *stronger* than the obligations contracting parties owe one another. "[T]he conditions imposed by the federal government pursuant to statute upon States participating in Medicaid . . . are not merely contract provisions; they are federal laws." *Westside Mothers v. Haveman*, 289F.3d 852 (6th Cir.

2002). As such, those Medicaid conditions "*have the binding force of law*," and "set a binding obligation on [the State]." *Id.* at 858, 863 (emphasis added). If a State breaches its obligations under the Medicaid program, the federal government can seek to cut off its federal funding, but private parties may also seek "prospective injunctive relief from a federal court against state officials for those officials' alleged violations of federal law." *Id.* at 862; *see also Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034, 1036 (8th Cir. 2002) ("Although Congress may not require a state to participate in a program created pursuant to the Spending Clause, once a state agrees to take the funds offered through such programs the state is bound to 'comply with federally imposed conditions.'").

Submission of the SPA that would expand Medicaid is thus an offer to contract with the federal government, and—should the federal government accept—the State would be bound to satisfy its obligations, including contribution of its increasing percentage for the costs of medical care of the expanded population. Other states have seen their Medicaid expansion SPAs accepted in as quickly as one day. *See supra*, at 12-13. And once the SPA is accepted, it would take another plan amendment to withdraw or alter that aspect of the plan, which the federal government is under no obligation to approve. Indeed, on one recent occasion, Maine discovered that some voluntary Medicaid benefits, once granted, may not be withdrawn at all. *See Mayhew v. Burwell*, 772 F.3d 80, 84 (1st Cir. 2014) (holding that ACA provision requiring the maintenance of voluntary benefits extended to 19- and 20-year-olds for nine additional years was constitutional). Ordering the Commissioner to submit the SPA is not a mere ministerial or preparatory act, but a commitment that the State will comply with obligations set by federal law—which, in this context, includes a commitment to spend tens of millions of dollars as part of the State's share of medical costs for the expanded population.

### B. The Maine Constitution and numerous statutes prohibit the Commissioner from submitting the SPA without an adequate appropriation.

In a tripartite system of government, the appropriations power is fundamentally a legislative one. *See* Atty. Gen. Op. No. 05-2, 2005 WL 4542875, at *3 (Me. A.G. Mar. 17, 2005) ("The appropriation of money is essentially a legislative function under our scheme of government."). Indeed, it is well accepted that "[t]he legislature is the sole and exclusive authority for the appropriation of the funds of the state." 16 C.J.S. Constitutional Law § 319; *see also* 81A C.J.S. States § 411 ("The power to appropriate the money of the State resides in the legislature, and such power is exclusive or supreme.").

The classic statement of this separation-of-powers principle is taken from the Mississippi Supreme Court's 1905 decision in *Colbert v. State*:

> Under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and not to be surrendered or abridged, save by the Constitution itself, without disturbing the balance of the system and endangering the liberties of the people.

*Colbert v. State*, 86 Miss. 769, 775, 39 So. 65, 66 (1905) (quoted with approval in Atty. Gen. Op. No, 05-2, 2005 WL 4542875, at *3 (Me. A.G. Mar. 17, 2005)).

This principle "had its origin in Parliament in the seventeenth century, when the people of Great Britain, to provide against the abuse by the king and his officers of the discretionary money power with which they were vested, demanded that the public funds should not be drawn from the treasury except in accordance with express appropriations therefor made by Parliament." *Humbert v. Dunn*, 84 Cal. 57, 59, 24 P. 111, 111-12 (1890); *see also* Richard H. Seamon, *The Sovereign Immunity of States in Their Own Courts*, 37 Brandeis L.J. 319, 414 (1998) ("The legislature's traditional exclusive control over appropriations predates the Framing of the Constitution, when most states required people with monetary claims against them to petition the legislature and forbade expenditures from the state treasury except pursuant to an appropriation statute.”).

Maine’s Constitution enshrines this fundamental approach to separation of powers. It vests the appropriations power in the Legislature by declaring that “[n]o money shall be drawn from the treasury, except in consequence of appropriations or allocations authorized by law.” Me. Const. Art. V, Pt. 3, § 4. *See* Atty. Gen. Op. No. 05-4, 2005 WL 4542877, at *3 (Mar. 30, 2005) (“The power to appropriate and deappropriate funds is, of course, a core legislative function.”); *see also* Seamon, *supra*, at 367 (“[T]he Maine legislature . . . has exclusive control over the treasury.”).

Because the appropriation power is a core legislative function, it cannot be exercised unilaterally by the executive branch; nor can the judiciary order the executive to exercise this power. “The separation of powers doctrine thereby prohibits any of the three Branches of government from exercising the powers relegated to either of the other two Branches.” *Opinion of the Justices*, 2017 ME 100, ¶ 13 (citing *Bar Harbor Banking & Tr. Co. v. Alexander*, 411 A.2d 74, 77 (Me. 1980)).[8] Even where the state purse contains sufficient funds to implement a particular program, those funds cannot be spent without the constitutionally required appropriation. That is the holding of *Weston,* 53 Me. 372, in which the Law Court declined to order the state Treasurer to pay the plaintiff despite the ready availability of funds and the plaintiff’s meritorious claim for payment. “The money being in the defendant’s hands, as Treasurer, he cannot legally pay it out

[8] “[T]he separation of governmental powers mandated by the Maine Constitution . . . is much more rigorous than the same principle as applied to the federal government.” *Mills*, 2017 WL 6513582 at *6 (quoting *State v. Hunter*, 447 A.2d 797, 799 (Me. 1982)).

without the warrant of the Governor and Council, as required by the constitution." *Id.* at 372. Under our Constitution, legislative authorization is required to make any payment from state funds.[9]

Indeed, the Legislature has enacted numerous statutes that specifically restrict—under penalty of criminal prosecution—the authority of the Commissioner (and other state officials) to exceed the limits of appropriated funds. For example, "[m]oney may not be drawn from the State Treasury except in accordance with appropriations duly authorized by law." 5 M.R.S.A. § 1543. And no "agent or officer of the State or any department or agency thereof . . . shall contract any obligation on behalf of the State in excess of the appropriation." 5 M.R.S.A. § 1583. Indeed, "[a]ny person who knowingly violates this section shall be guilty of a Class E crime." *Id.* Likewise, "[a] state department may not establish a new program or expand an existing program beyond the scope of the program already established, recognized and approved by the Legislature until the program and the method of financing are submitted to the Department of Administrative and Financial Services, Bureau of the Budget for evaluation and recommendation to the Legislature *and until the funds are made available for the program by the Legislature*.") 5 M.R.S.A. § 1582(1) (emphasis added). These provisions make crystal clear that "legislative authorization of the purpose and amount to be expended is required before funds may be drawn down from the state treasury." Atty. Gen. Op. No. 05-2, 2005 WL 4542875, at *3 (Me. A.G. Mar. 17, 2005).

Because submitting the SPA would expose the State to binding, and potentially permanent, obligations under the federal Medicaid program, the order sought by the Petitioners would require the Commissioner to violate all of these statutes (as well as the Constitution), thereby putting him at risk of criminal penalties. A SPA is a proposed contract, and if accepted by the federal

[9] For this reason, Petitioners cannot rely upon the alleged availability of *unappropriated* funds—which, after all, may be used by the Legislature for any number of purposes—to justify their demand that a SPA be filed even without the necessary appropriation.

government, "would constitute an obligation on behalf of the State in excess of the appropriation." 5 M.R.S.A. § 1583. Hiring the necessary employees to prepare for expansion would likewise require the Commissioner to draw "from the State Treasury" in a manner not "in accordance with appropriations duly authorized by law." 5 M.R.S.A. § 1543. And filing the SPA would also constitute the expansion of an existing program (MaineCare) before "funds are made available for the program by the Legislature." 5 M.R.S.A. § 1582(1).

The Commissioner's prudent decision to await an appropriation before submitting a SPA for federal approval is thus *compelled by*, rather than contrary, to the applicable constitutional and statutory law. Indeed, the need for an appropriation was the reason the Commissioner gave for his decision not to submit a plan amendment to the federal government in three separate reports to the Legislature. *See* Record at 14, 18-26, 27. And when a bill that would only partially fund expansion costs was belatedly introduced in the Legislature in April, proponents of the measure—including the bill's sponsor and representatives of the Petitioners here—emphasized that the appropriation was necessary to proceed with Medicaid expansion. *See supra*, at 10-11. No appropriation materialized.

In sum, "both the Maine Constitution and statutory law require that [fiscal obligations] be subject to funding by the legislature." *KHK Assocs. v. Dep't of Human Servs.*, 632 A.2d 138, 140 (Me. 1993) (citing Me. Const. art. V, pt. 3, § 4; 5 M.R.S.A. § 1543 (1989)). The Commissioner cannot be compelled to submit a SPA until an appropriation is made, and any order to the contrary would violate longstanding and fundamental principles of separation of powers.

### C. Nothing in § 3174-G(1)(H) can be read to alter the constitutional and statutory restrictions on the Commissioner's authority (or the powers of this Court).

Ignoring the constitutional problems that arise from submission of a SPA without a supporting appropriation, Petitioners contend that submission of the SPA by April 3 is an unambiguous mandatory duty. *See* Petitioners Memo. at 8-9. Even if this were true, the statutory language of § 3174-G(1)(H) would yield to the constitutional prohibition on the Commissioner's ability to commit unappropriated funds to expansion. But the Court need not reach that question, because the language of § 3174-G(1)(H) is best read not to create any such conflict in the first place. This Court must "seek to harmonize" apparently contradictory "statutes if possible," *In re Estate of Footer*, 2000 ME 69, ¶ 8, 749 A.2d 146, 148, and the Court "must interpret all provisions in a manner that avoids any danger of unconstitutionality." *Desfosses v. City of Saco*, 2015 ME 151, ¶ 8, 128 A.3d 648, 651 (quotation marks omitted).

*First*, the 90-day deadline in § 3174-G(1)(H) is best read as directory, not mandatory.[10] The Law Court has long held "that statutory provisions requiring an act to be done within a certain time are directory and not mandatory or jurisdictional unless the statute manifests a clear intent to the contrary." *Anderson v. Comm'r of Dep't of Human Servs.*, 489 A.2d 1094, 1099 (Me. 1985). *Anderson* noted that one way to determine that a deadline is mandatory is "when it both expressly requires official action within a set time and specifies consequence for failure to comply." *Id.* (citing *Thomas v. Barry*, 729 F.2d 1469, 1470 n.5 (D.C. Cir. 1984)); *see also Davric Maine Corp. v. Maine Harness Racing Comm'n*, 1999 ME 99, ¶¶ 13-14, 732 A.2d 289, 294 (declining "to create a sanction where none is expressed or implied" for failure to hold a board election in the period anticipated by statute); *Bureau v. Staffing Network, Inc.*, 678 A.2d 583, 590 (Me. 1996) (declining to penalize Workers' Compensation Board for issuing provisional order after the twenty-one day deadline established by statute"); *Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 918 (1st Cir. 1983) (holding that "Congress' lack of providing sanctions for a parent's removal of her child from his

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[10] For the reasons explained below, Petitioners miscalculate the effective date of the act, and thus misstate the date upon which the 90 days would have run. *See infra*, at II.

current placement was compelling evidence that the statute [prohibiting removal] was directory only").

In this case, the deadline in § 3174-G(1)(H) does not impose any consequence for the failure to submit the plan amendment within the required 90 days. It does not, for example, authorize somebody else to submit the amendment, impose any penalties on the Commissioner, or otherwise provide for a consequence. Moreover, read in conjunction with the 180-day period for providing coverage, § 3174-G(1)(H) *assumes* approval of a SPA under the minimum time frames that apply to federal review and acceptance. *See* 42 C.F.R. § 430.16 (providing 90 days for CMS's review of a SPA). But there are a number of practical realities that would require an adjustment to that time frame: a request for more information from the federal government before obtaining approval, *see id.*; advance notice requirements for Indian tribes, *see* 42 U.S.C. § 1396a(a)(73)(A); or (as in this case) a failure to fund necessary expenditures. Accordingly, the 90-day time frame should be considered as directory, especially to avoid infringement on the Legislature's constitutional power to appropriate funds. The Commissioner's failure to submit a SPA within the 90-day deadline thus is not a violation of law.

Petitioners cite 1 M.R.S.A. § 71(9), a rule of construction providing that "the words '[s]hall' and 'must' are terms of equal weight that indicate a mandatory duty, action or requirement." But the Law Court has applied the directory/mandatory distinction after enactment of § 71(9). *See, e.g.*, *Guarantee Tr. Life Ins. Co.*, 2013 ME 102, ¶ 39, 82 A.3d at 132 (holding that a requirement that an agency "shall make an order on hearing" within 30 days was directory, not mandatory). And the earlier case Petitioners cite, *McGee v. Sec'y of State*, 2006 ME 50, 896 A.2d 933, relied on specific statutory language in the relevant title, not just § 71(9) by itself. *See id.* at ¶¶ 14-15, 896 A.2d at 938–39.

*Second*, nothing in the language of § 3174-G(1)(H) can be read to require submission of a SPA without the necessary appropriation to pay for the obligations that arise from expansion. To the contrary, the need for implementing appropriations was specifically flagged before the election in the Fiscal Impact Statement that accompanied Question 2. By declining to enact an appropriation or revenue source, the drafters of Question 2 were aware that the necessary appropriations were still subject to, and contingent upon, the ordinary legislative process. Moreover, construing § 3174-G(1)(H) to require submission of the SPA without the necessary appropriation to satisfy the State's commitments would conflict with the other statutes prohibiting the use of funds without an appropriation, not to mention the Constitution. This Court should read those provisions in a way that harmonizes their language, not one that creates a manifest conflict. *See Footer*, 2000 ME 69, ¶ 8, 749 A.2d at 148; *Yeadon Fabric Domes, Inc. v. Maine Sports Complex, LLC*, 2006 ME 85, ¶ 20, 901 A.2d 200, 206 ("When two statutes appear to be inconsistent, we should harmonize them if at all possible.").

*Third*, the Legislature's failure to appropriate necessary funds—even those anticipated by the referendum—is itself a law that effectively amends § 3174-G(1)(H). This was explained in detail by the Attorney General's Office in a careful 2005 opinion, which addressed a highly analogous situation of an unfunded initiative enacted directly by voters to increase the state's funding of education.

In that Opinion, the Attorney General's Office was asked to respond to several questions regarding a voter-approved 2004 initiative that required the state government to fund 55% of public education costs. Atty. Gen. Op. 05-4, 2005 WL 4542877, at *1. The Attorney General began by noting that "there is nothing in Maine's Constitution that forbids the people's elected representatives, when gathered in legislative session, from reconsidering, amending, or repealing initiated laws" because "at the end of the day, initiated laws are like any other[.]" *Id.* at *2. "Even if the Initiative expressly required immediate state funding of education at the 55% level, the Legislature has the power to change that requirement by enacting a statute or budget provision." *Id.* Indeed, the Maine Constitution "specifically recognizes the Legislature's power over appropriations with respect to initiatives," and, by "delay[ing] the initiative's operative date until 45 days after the Legislature has next convened . . . expressly recognize[s] a role for the Legislature. *Id.* at *1-*2 (citing Me. Const. Art. IV, pt. 3, § 19).

"Consequently, if, through the budget process, the Legislature funds education at a level different from statutory goals, such a decision is a lawful exercise of the Legislature's appropriation power." *Id.* at *4. A legislative decision "not to provide the additional appropriations required to fund education at the level called for by the [i]nitiative . . . falls within the Legislature's power to amend those targets." *Id.* In sum, because "the State budget for any biennium is a law in and of itself which, to the extent it differs from the provisions of other laws, effectively amends those laws," it follows that "any budget statute that funds [an initiative's purpose] at a level lower than . . . the Initiative's goal . . . will have amended those laws." *Id.*

The same logic applies here. To the extent § 3174-G(1)(H) sets a goal for the expansion of Medicaid, the Legislature's decision not to fund the costs of such expansion is "a law in and of itself" that "effectively amends" the requirements of § 3174-G(1)(H). This makes perfect sense; it would be illogical *in any context* to require a state official to take action for which no funding has been provided. Imagine, for example, a statute that mandated the Department of Motor Vehicles to provide $25 gas cards to all new drivers, and to notify them of their right to receive the gas cards four weeks in advance. If the Legislature subsequently refused to provide any appropriation to pay for the cards, should the Department still be required to notify drivers of their right to gas cards?

Of course not—the reasonable view would be treat the Legislature's decision not to fund the program as also amending the requirement to give the notice.

So too, here. After enactment of the initiative, the Legislature declined to provide the necessary appropriation to fund the Medicaid expansion. If it should do so in the future, § 3174-G(1)(H) can be given effect. In the meantime, there is no reasonable basis to interpret the statute as requiring the Commissioner to undertake a futile act—especially when the Constitution and other statutes forbid him from committing or spending unappropriated funds.

## II. Petitioners Have Miscalculated The Applicable Deadlines, And Their Secondary Claims Are Not Fit For Decision At This Time.

Petitioners have also incorrectly calculated the effective date of Question Two. They assume it was effective on January 3, 2018, which (if accurate) would mean that the 90-day period referenced in § 3174-G(1)(H) expired on Tuesday, April 3. *See* Petition ¶ 3. Although January 3 is the day the Legislature reconvened after the election, it is not the date on which § 3174-G(1)(H) became operative under any reading of the relevant law.

The "question of the effective date [of a statutory amendment] involves interpreting the statute and, therefore, it is a question of law subject to de novo review." *In re Carleton Woolen Mills*, 281 B.R. 409, 413 (D. Me. 2002). Here, the governing law is the Constitution itself, which provides that a law enacted by initiative:

> shall, unless a later date is specified in said measure, take effect and become a law in 30 days after the Governor has made public proclamation of the result of the vote on said measure, which the Governor shall do within 10 days after the vote thereon has been canvassed and determined; provided, however, that *any such measure which entails expenditure in an amount in excess of available and unappropriated state funds shall remain inoperative until 45 days after the next convening of the Legislature in regular session*, unless the measure provides for raising new revenues adequate for its operation.

Art. IV, pt. 3, § 19. In this case, Question 2 unquestionably "entails expenditure in an amount in excess of available and unappropriated state funds"—indeed, the necessary funds remain unappropriated to this day. Nor did the measure "provide[] for raising new revenues adequate for its operation." As a result, § 3174-G(1)(H) did not become operative until 45 days after the Legislature reconvened in regular session, on January 3. *See also Opinion of the Justices*, 460 A.2d 1341, 1347 (Me. 1982) ("That proviso mandates that the Act 'remain inoperative' until 45 days after the Legislature next convenes in regular session."); Atty. Gen. Op. No. 05-4, 2005 WL 4542877, at *1 (same).

This makes the "effective date of this paragraph" 45 days after January 3, which is February 17, 2018. Ninety days from February 17 is May 18, 2018; 180 days would be August 16, 2018. The April 3 and July 2 deadlines identified by Petitioners are incorrect as a matter of law.

This miscalculation on Petitioners' part has limited practical effect on the primary challenge that Petitioners bring because May 18 will have passed by the time argument occurs in this matter. Petitioners' error does, however, affect Petitioners' bare-bones contention that the Court should now "[o]rder that DHHS adopt the required rules in a timely manner to ensure that eligible individuals are enrolled for and eligible to receive services no later than July 2, 2018." Petitioners' Memo. at 11.

To begin, the Court should not entertain this request. Petitioners' argument in support of this claim is confined to a passing, conclusory statement in a single footnote. "It is settled beyond peradventure that issues mentioned in a perfunctory manner, unaccompanied by some effort at developed argumentation are deemed waived." *Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990) (quoting *Collins v. Marina–Martinez*, 894 F.2d 474, 481 n.9 (1st Cir. 1990)). In *Graham*, the court declined to consider an argument made "in one sentence" in its brief. *Id.* That is what Petitioners have done here (except the sentence is further buried in a footnote). This is not the type of careful argument from which orders to the Department to engage in a complicated rulemaking process can be fashioned.

Moreover, Petitioners' claim for a rulemaking order is not yet fit for decision. "[C]ourts will not review an agency action unless the issue is 'ripe' for judicial consideration and action." *Maine AFL-CIO v. Superintendent of Ins*., 1998 ME 257, ¶ 7, 721 A.2d 633, 635. This is "to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *New England Tel. & Tel. Co. v. Public Utils. Comm'n*, 448 A.2d 272, 302 (Me.1982) (quotation marks omitted). It goes without saying that, with the 180-day deadline not running until August 16, there has been "no final agency action" or "failure or refusal to act"—a requirement for a justiciable claim under the MAPA. 5 M.R.S.A. § 11001(1).

Nor have Petitioners exhausted these claims before the agency. They do not contend to have presented any claim seeking enrollment or coverage of costs to the agency, and the agency has not had the chance to develop any record of such claims before it. The doctrine of exhaustion of remedies applies here, "to avoid interference with the functions of an administrative agency and to recognize the advantages of leaving some preliminary determinations to the agencies which are particularly competent to handle them." *Cushing v. Smith*, 457 A.2d 816, 821 (Me. 1983); *see also New England Whitewater Ctr., Inc. v. Dep't of Inland Fisheries & Wildlife,* 550 A.2d 56, 60 (Me. 1988) (noting that the exhaustion doctrine "ensures that the agency and not the courts has the first opportunity to pass upon the claims of the litigants").

Indeed, should the Court enter an order requiring the SPA to be submitted, should that order survive on appeal, and assuming the federal government accepts the SPA, then—and only then—would a dispute over the rulemaking obligations become fit for judicial review. The Court therefore can dismiss the Petition's claim to enforce the rulemaking provisions for this independent reason (although these claims also fail because of the Legislature's decision not to appropriate funds to cover the costs of Medicaid expansion).

## CONCLUSION

For the reasons stated, the Commissioner respectfully requests that the Rule 80C Petition be dismissed with prejudice.

Respectfully submitted,

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